Let's Talk About Sex:
An Examination of Sex as a Factor in Indiana's Best Interest of the Child Statute

An Honors Thesis (HONR 499)

by

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Abstract

In the United States, the "best interests of child" is the standard by which legal and physical custody of a child is awarded. Such a standard places paramount emphasis on the holistic well-being of the child in question. Indiana Code § 31-14-13-2 lays out eight factors a judge must consider in their decision. One of the criteria considered by the Indiana judiciary is the sex of the child, making Indiana one of only two states to consider said criterion. While most states simply do not have it listed statutorily, some states, (e.g., Arizona, Arkansas, California, Nebraska, Texas, and Vermont) specifically prohibit sex from being a factor weighed. Still others (e.g., Alabama, Iowa, and New York) have ruled such considerations unconstitutional. This paper seeks to determine whether the sex of a child should be a factor deliberated by synthesizing empirical research on gender/sex difference with legal research on context surrounding the "best interests of the child" standard.

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Process Analysis Statement

As a child of divorce, I have borne witness to the profound manner in which it impacts those involved—namely the children—both in the short- and long-term. As someone whose life was dictated by the Indiana Parenting Time Guidelines and continual litigation, I felt somewhat of a pawn in the judicial game. While the law facially requires that judges rule in the child's best interest during custody dispute, growing up made me realize that the guidelines and statutes provided to the Indiana judiciary do not reflect what is actually in a child's best interests. This aspect of my lived experience has embedded a strong conviction within me that laws must be modified so that the best interests of the child don't only exist in law, but also in life.

During my time as a women's and gender studies major, I have come to realize the immense dissonance between the reality and perception of gender and sex differences. As such, when I was reading through Indiana Code searching for inspiration—ironic, I know—for my thesis, I was struck by the fact that judges in Indiana are *required* to consider the sex of the child when determining what custody arrangement is in their best interests. After attempting to determine if such a statutory factor was common in other states, I quickly realized that there was no easy way to do so. Family law is the jurisdiction of each state, so there are variances from state-to-state and no one resource to compare all with ease. (If only I had known that a surprising lack of information would be a prevalent theme throughout the entirety of this process.)

In order to sufficiently discern if this criterion was meritorious, my thesis was interdisciplinary in nature—combining social sciences, public policy, and the law. This combination was the appropriate culmination of my two majors, political science and women's and gender studies. Naively, I believed that I was sufficiently capable at the onset of this thesis to

complete all research and analysis necessary. Realizing how different legal research was from any research I had completed in the past was a rude awakening. I had to learn how to navigate legal databases (i.e. Westlaw) and expand my vocabulary to include more legal vernacular—don't get me started on the headache of learning how to properly cite cases!

I commenced my research with the legal aspects of my intended study. I have visited the family law statutes of each of the 50 states. I searched Westlaw far and wide for cases, secondary sources (I know what those are now!), and statutes. I emailed judges, attorneys, state representatives for guidance. To complete the research relating to child development, I spent way too much time on JSTOR and in parenting sections at various libraries and bookstores.

Undoubtedly, this process taught me more about myself taught me more than any other class I have taken during my undergraduate career. For the first time ever, starting the night before (or day of) was not merely a suggestion. Through my research, the value of patience was deeply ingrained. I am thankful I did not keep a running tab of the time I spent fruitlessly searching the bowels of Westlaw for something, anything. Moreover, I was genuinely astounded by how little research existed in several of my queries. Never in my wildest dreams did I think I would have to scour the web for hours upon hours just to discern how certain laws have been applied. I came into this process a positivist and will leave…someone else.

I have always known that I desire to affect positive change in this world. In the future, I hope I will be able to synthesize my love for academia and activism. This thesis seemed like an exciting starting point in that journey. I am sure one day I will look back and see all of the things that could have been better, but for today I am thankful that this research allowed me the opportunity to start living my dream job today.

Part One:

In the Best Interest of the Child

I. Best Interest of the Child

The Best Interest of the Child Doctrine has become hegemonic within legal discourse—especially as it applies to child custody cases. While the concept remains nebulous, the standard is a highly subjective, discretionary test which weighs all factors deemed relevant to the wellbeing of a child. The standard has realized its "greatest influence" in such situations (Carbone, 2014, p. S113). While it was only incorporated into United States family courts during the 1960s (Duncan, 2004, p. 1250), the standard's origin is centuries old (Carbone, 2014, p. S112). Finding its foundation in 18th century English common law, the doctrine's intended purpose was a "justification for intervention" by the state, superseding the rights of the parent (Carbone, 2014, p. S112). The standard would cross the pond over a century later in 1899, but would not be applied to parental rights; rather, it would first be applied to juvenile justice policy (Silva, 2014, p. 415). In the meantime, child custody law in America would go through immense transformation. From an ideology predicated on the English common law precedent of "absolute paternal power" (Charlow, 1986, p. 267) to one favoring the rights of the mother, "the custody pendulum [would complete] its shift in the mid-to-latter part of the nineteenth century (Bajackson, 2013, p.314).

And there the pendulum would remain for over a century. Though courts had been utilizing the "best interest of the child" standard "for years both in legal rulings and *dicta*" , they did not formally commence steady reliance upon the standard as it applies to child custody cases until the early 1970s (Duncan, 2004, p. 1250). Not a spontaneous occurrence, this paradigmatic shift coincided significantly with the second-wave of the feminist movement. During this time, women's rights advocacy groups nationwide worked tirelessly not only to expose gender inequalities, but also to press the legislative and judicial branches at all levels to adopt gender

neutral legal rules (Bruch, 2012, p. 1). Progressing to a deeper realization of these inequalities, "most states began to adopt no-fault divorce laws and remove the gender based bias in custody decisions" (Duncan, 2004, p. 1250). This goal was achieved through a standard endeavoring to rule in the favor of the "best interest of the child."

Setting the basis for such a sweeping transformation was the Uniform Marriage and Divorce Act (UMDA) set forth in 1970. This legislation drafted by the National Conference of Commissioners on Uniform State Laws asserted that custody decisions should be reliant upon what is in the "best interest of the child" (UMDA, § 402). Further, it delineated relevant factors to be expressly considered to guide such determinations. The UMDA would go on to be adopted—albeit with variability—by most states (Goldstein, 2016, p. 11). Prior to legislating the best interests standard, courts typically wielded the "Tender Years' Doctrine" which assumed that regardless of extraneous circumstances the mother should have custody of the children, especially when they were of tender years (less than four years old). It would take over two decades for 35 states to "replace their 'tender years' custody rule[s] [that of the] 'best-interest of the child' (Bruch, 2012, p. 5).

While gender was never mentioned in the 67 page UMDA document, the work was riddled with allusions to its intent of ridding marriage and divorce laws nationwide of gender-specific advantages and disadvantages. In the prefatory note of the final draft presented, it was made known that the draft was inspired by the 1965 report of the Special Committee on Uniform and Divorce Marriage Laws, an exploration recommending no-fault divorce and its benefits—more specifically the gender benefits (UMDA). Furthermore, as variations were made state-by-state, "the additions have remained facially gender-neutral" (Bajackson, 2013, p. 315).

One of the first legal opinions corroborating the standard's gender neutral intent can be found in *State ex rel. Watts v. Watts*, 350 N.Y.S. 2d 285 (Fam. Ct. 1973). In his ruling, Judge Sybil Kooper "challenged nearly a century of judicial presumption in favor of mothers" (Mason, 1994, p. 123). Kooper asserted that "sound application of the 'best interests of the child' standard" should not increase the burden leveled against the father "in providing suitability for custody" compared to that expected of the mother: "The simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide." *State ex rel. Watts v. Watts*, 350 N.Y.S. 2d 285, 290 (Fam. Ct. 1973). Kooper cited what would come to be considered landmark *Frontiero v. Richardson* (1973) which had been decided earlier that year:

> The message of *Frontiero* is clear: persons similarly situated, whether male or female, must be accorded evenhanded treatment by the law. Legislative classifications may legitimately take account of need or ability; they may not be premised on unalterable sex characteristics that bear no necessary relationship to the individual's need, ability or life situation. *Watts,* 350 N.Y.S. at 290.

As recently as 2006, the intent of being gender-neutral in nature has been explicitly upheld: "Over the years, the "best interest of the child" standard has developed in this country through state courts and legislatures towards a more gender-neutral and child-centered inquiry." *Doherty v. Wizner*, 150 P.3d 456, 460 (Or. Ct. App. 2006).

Aside from serving as an attempt to mitigate gender-based bias in custody decisions, the standard also seeks to, as nominally indicated, provide a legal decision "the best interest of the child." But what is in the child's best interest and who gets to decide? It depends on the state in which the case is being heard, as family law cases fall under the jurisdiction of state, rather than federal courts, due to their nature. Statutorily defined in two parts by 22 states (Child Welfare Information Gateway, 2016, p. 2) the Best Interest of the Child Standard (BICS) is first defined

"in general terms and requires that custody decisions be made in the child's best interest is to advance and protect the child's physical, mental, social, and moral well-being" (McLaughlin, 2011, p. 129-130). This premier setting forth of a purpose is where the other states end defining the standard statutorily, relying fully on the judge's discretion to determine what should be considered when determining a child's best interest. Alternatively, those who define the standard in two parts, continue on by laying out statutory criteria with the aim of guiding judges in making that determination.

Whether defined in one or two parts, state statutes often provide some degree of guidance beyond determining what is in the child's best interest. Judges are often armed with, at minimum, "overarching goals, purposes, and objectives that shape the analysis in making best interests determinations" (Child Welfare Information Gateway, 2016, p. 2). According to the Child Welfare Information Gateway (2016, p. 2), the following are predominant guiding principles laid out in state statutes across the country:

1. The importance of family integrity and preference for avoiding removal of the child from his/her home (approximately 28 States, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands)
2. The health, safety, and/or protection of the child (21 States and the Northern Mariana Islands)
3. The importance of timely permanency decisions (19 States and the Virgin Islands)
4. The assurance that a child removed from his/her home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult (12 States, American Samoa, and Guam)

As previously mentioned, the Uniform Marriage and Divorce, when published in 1970, demanded the court "consider all relevant factors" (p.53). Delineating specific statutory criteria that should always be taken into consideration, they laid out five factors (UMDA, 1970, p. 53):

> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school, and community; and
(5) the mental and physical health of all individuals involved.

Further, the legislation held that the "conduct of a proposed custodian that does not affect his relationship to the child" should not be considered by the court (UMDA, 1970, p. 54).

Many states that consider statutory criteria today adopted those criteria set forth in the UMDA, often with slight alterations. Some of these adjustments were made before they adopted the factors for the first time, and still other states have updated their criteria with the advancement of social sciences, health sciences, and new legal precedents. According to the data most recently collected by the Children's Bureau, the following are factors are most commonly found in state statutes (2016, p. 2):

1. The emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers (15 States and the District of Columbia)
2. The capacity of the parents to provide a safe home and adequate food, clothing, and medical care (10 States)
3. The mental and physical health needs of the child (nine States and the District of Columbia)
4. The mental and physical health of the parents (nine States and the District of Columbia)
5. The presence of domestic violence in the home (nine States)

Regardless of the extent to which each state guides their family courts' application of the standard, across the board it is widely accepted—and has been since the court's formulation of the standard in the 1960s and 70s—that "both the child's physical and psychosocial well-being is paramount"(Silva, 2014, p. 423).

The endeavor of deciding in the child's best interest is undoubtedly a noble pursuit. So much so that it seems almost wrong to take issue with such a standard; however, good intentions do not a good standard make. In fact, a preponderance of legal scholars agree that the BICS "has at least as many weaknesses as it does strengths" (Bajackson, 2013, p. 311). Perhaps most aptly describing the perplexing nature of the standard, Regent University School of Law Professor

Lynne Marie Kohm asserted the doctrine "is at once the most heralded, derided and relied upon standard in family law today. It is heralded because it espouses the best and highest standard; it is derided because it is necessarily subjective; and it is relied upon because there is nothing better" (2008, p.1).

In theory, the individualization allowed by the standard spares a child's fate from being compromised by a one-size-fits-all model. As each child has their own unique lived experience, personality, and external circumstances, it seems only logical that each decision must be made independently, accounting for each distinct case. However, the reality of the situation is not that straightforward. Case by case, a judge is tasked with the responsibility of "decid[ing] what is 'best' for any child at any time under any particular circumstance" (Kohm, 2008, p. 1). Not only is this an immense amount of power to allow someone who is an expert in the field, such a reliance on someone whose expertise most likely lies within a different—albeit related—field is even more of a gamble.

The standard, despite its best efforts, fosters incommensurability and subjectivity (Emery & Scott, 2014, p. 74). Even in states where statutory criteria are defined, the judge retains significant discretion: "The general assumption (consistent with the choice of a standard rather than a rule) is that different proxies for best interests will vary in importance depending on the circumstances of the case, and as a consequence statutes do not guide courts by rank ordering factors" (Emery & Scott, 2014, p. 75). Thus, the courts are able to decide which factors should be weighed more heavily than others. In any given case, the judge can determine which criteria most heavily contribute to the child's best interest. Which is more important: the wishes of the parent(s) or the wishes of the child? Is a child's tie to their home, school, and community as important to their well-being as the interrelationship of the child with their parents? Which is in

the child's best interest: living with a parent who is mentally healthy or a parent who is physically healthy? All of these questions point to the burden of subjectivity placed squarely upon a judge's shoulders on a case-by-case basis.

When incommensurability and subjectivity are coupled with the wide breadth of discretion afforded the judge, decisions are prone to bias, compromising what could be in the child's best interest. Within his opinion on *David M. v. Margaret M.*, 385 S.E.2d 912, 919 (W. Va. 1989), Justice Richard Neely addressed the standard's inherent susceptibility to bias:

> No issue is more subject to personal bias than a decision about which parent is 'better.' Should children be placed with an 'open, empathetic' father or with a 'stern but value-supporting' mother? The decision may hinge on the judge's memory of his or her own parents or on his or her distrust of an expert whose eyes are averted once too often. It is unlikely that the decision will be the kind of individualized justice that the system purports to deliver. (p. 919)

The very nature of the standard "necessarily invites" courts to incorporate their own values, morals, and biases in order to determine what is best (Guggenheim, 2005, p. 40). In a field guided by precedent, judges are left with little guidance when precedent offers so little when applied to individual children. Moreover, the law and expert opinions bear little effect on the judge's decision (Atkinson, 1983, p. 16). Rather, "the decision in a custody case often will boil down to what is in the heart of the trial judge who hears the case" (Atkinson, 1983, p. 16).

Post 1960s, as states across the country adopted the BICS, "unbridled judicial discretion became the pattern for best interests decision-making" (Kohm, 2008, p. 3). In fact, "[this precedent] became so firmly [e]mbedded that many judges often gave no more than lip service to precedent or even to legislation in their own state" (Kohm, 2008, p.3). Adapting to the extended breadth of discretion sustained by the court, custody litigators "know that the judge is the most important witness in any case" (Kohm, 2008, p. 38). Just as they would with any witness,

litigators seek to understand the biases each judge brings to the decision-making table (Kohm, 2008, p. 38).

These weaknesses have left the standard intended to combat gender-specific decisions wide open to gender bias in particular (Jacobs, 1997, 848). To illustrate what an article published in the Georgia State University Law Review referred to as the 'hidden gender bias" of the BICS, a case out of Michigan in 1994 involving one Jennifer Ireland was cited. Ireland, becoming a mother at the age of 19, never married and raised daughter, Maranda, on her own (Jacobs, 1997, 846). Accepted into University of Michigan on scholarship, Ireland relied on a licensed day care facility for Maranda while attending classes (Jacobs, 1997, 846). Upon the father, Smith, failing to pay weekly child support, Ireland sued; "Smith countered by suing for custody of Maranda" (Jacobs, 1997, 846). Justice Raymond R. Cashen would find in favor of Smith, who had never spent time with Maranda prior to this, holding that "but for the daycare issue [Ireland and Smith] were equally good parents" (Jacobs, 1997, 846). Cashen emphasized that this factor was "pivotal" to his decision, asserting that "there is no way that a single parent [like Ireland]...can do justice to their studies and the raising of a child." Instead, he found it would be best for Maranda to be placed in the custody of her father, where she would be taken care of by Smith's mother, in lieu of being raised in the way she had been for the entirety of her life (Jacobs, 1997, 847). Ireland would regain custody of her daughter a year later (*Mother Wins Day-Care Custody Battle*, 1995), but not before her daughter would endure undue emotional trauma from being removed from her mother (Jacobs, 1997, 847)—not to mention the hefty legal fees Ireland likely accrued.

While this case may appear an anomaly, it was only one case utilized to illustrate what has been described as a "'nationwide backlash of (gender) discrimination in child custody

awards' under the guise of the best interest of the child standard" (Jacobs, 1997, 848). Though these judges most likely are not ruling with malice, or even cognition of their inherent biases, the decisions are no less impactful. Moreover, decisions predicated on "inherent biases", like any others, are often "extremely difficult to change on appeal" (Kohm, 2008, p. 38). While Ireland might have been able to remedy her case, others are not nearly as lucky and many do not have the resources to even try.

Though the BICS strives to be gender-neutral in nature, even those most novice to custody litigation recognize "that a so-called presumption-free and gender-neutral legal climate is at best wishful thinking" (Kohm, 2008, p. 38). While if the adoption of the standard marked "first time in U.S. history that child custody laws have been free of gender based factors (Artis, 2004, 774)," it did not mark the last. Two states, Maryland and Indiana, list gender and sex of the child respectively as factors to be considered when determining what is in a child's best interest. If the standard is susceptible to gender bias when a judge is not explicitly told to consider it in a decision, how does it being explicitly listed as a factor to weigh affect that susceptibility? If the standard relies upon the premise that gender does not matter when determining a child's best interest, is listing it as a statutory criterion contrary to the standard's intent? The next section of this paper will examine Indiana and the use of sex as a factor to answer these questions.

II. Sex as a Factor

Each state retains the discretion to choose if and how they want to incorporate the BICS into their family courts. As previously discussed, all 50 have decided to do so, but all have done it in differing, albeit "strikingly similar", ways (McLaughlin, 2011, p. 129). Their similarities most likely stem from the fact that many adopted a statute based off of the Uniform Marriage and Divorce Act of 1970. Whether differing overarching principles, goals, or explicit factors are

considered, each state has made the statute uniquely their own. Each state's statute reflects the context in which it was adopted and, if applicable, revised. Namely, what was the culture of the state? When was the statute adopted? Which states had most recently adopted or modified statutes of their own? How had those states fared? What was social science of the day posing to the discussion?

While the statute has been adapted since its original adoption in the 1970s, it has retained all of its original factors—though *additional* modifications have been instituted. Below is Indiana Code § 31-14-13-2 which delineates some of those factors deemed "relevant" when determining what is best for a child (phrases in **bold** indicate overlap with the UMDA):

> (1) The age and sex of the child.
> **(2) The wishes of the child's parents.**
> (3) **The wishes of the child,** with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> **(4) The interaction and interrelationship of the child with:**
> **(A) the child's parents;**
> **(B) the child's siblings; and**
> **(C) any other person who may significantly affect the child's best interest.**
> **(5) The child's adjustment to home, school, and community.**
> **(6) The mental and physical health of all individuals involved.**
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

Subsection Seven (7) and Eight (8) were both added to the statute in the 90s (1996 and 1999 respectively), meaning that barring criterion one, all other factors outlined in the original statute were drawn directly from the factors posed in the UMDA. Furthermore, criteria 2-6 constitute the entirety of the factors listed in the UMDA. Why was it so important to Indiana that they add "age and sex of the child" as an additional criteria when they adopted the rest of the uniform code as is?

Unfortunately, there is very little legislative history on the statute and no public access to the discussion regarding why Indiana lawmakers settled upon the original factors in the first place. Because of the immense overlap with the UMDA, one can reasonably conclude that they took the UMDA into consideration. That conclusion cannot, however, explain why age and sex were tacked on at the *top* of the list. In an article for *Family Law Quarterly* (1983), Jeff Atkinson, professor at DePaul University College of Law in Chicago and past chair of the ABA Child Custody Committee, dug into various criteria considered across the United States when determining child custody within the scope of the BICS. Citing more than five cases, Atkinson asserted that "a consideration of age and sex of the children when making custody decisions" is "a backdoor to the Tender Years Doctrine" (1983, p. 13). While these courts operate under the guise of giving equal credence to mothers and fathers, they will find in favor of the mother solely because of the age and sex criteria. This phenomenon aligns well with the Tender Years Doctrine, predicated on the presumption that women's natures are more nurturing than males', which originally assigned custody automatically to mothers when the child was of "tender years" (typically four or younger). However, as time went on, courts expanded this doctrine holding that mothers might be better suited to parenting overall, not simply better suited at raising young children.

Conducting legal research in order to determine if Atkinson's observation holds true for the application of §31-14-13-2 (a) in Indiana proved difficult for a number of reasons. First, the wealth of information provided by legal databases predominantly covers appellate court decisions, not trial court decisions. Thus, an appeal must be made regarding how a judge applied the statute. Even when this is the case, a judge is not likely to explicitly state when making a custody determination which criterion, if any, tipped the scale in favor of one parent. As DePaul

professor Dr. Julie Artis reminded, "Although appellate court judges write long documents that reveal their legal reasoning, very often, rulings written by trial court judges do not disclose the process by which they arrived at a particular decision" (2004, p. 772). Rather, they are more likely to frame their decision as a holistic review of the criteria, making it impossible to know how or if a judge is applying the age and sex criteria in a manner reminiscent of the Tender Years Doctrine.

In Indiana, only one case specifically cites the use of the child's sex when making custody decisions: *Matter of Adoption of Thomas*, 431 N.E.2d 506 (Ind. Ct. App. 1982). Justice William G. Conover, in his opinion, addressed the § 31-14-13-2 (a) by citing two applicable cases. First, he cited to *Stanley v. Illinois*, 405 U.S. 645 (1972), reiterating that "the Supreme Court has held the presumption that a natural mother is better suited to have the custody of young children violates the equal protection clause of the 14th amendment." *Id.* at 513. Further, he evoked *Frontiero v. Richardson*, (1973) 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 asserting that "[d]ifferential treatment based on sex is 'suspect.'" *Id.*

While Indiana still considers sex of the child, only one other state, Maryland, considers the gender of the child. (Disclaimer: Gender and sex undoubtedly have different meanings contemporarily (*See Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015)); however, *sex* denotation then was virtually synonymous to the current use of *gender* when written in §31-14-13-2 (a) during the 1970s. Indeed, the current Indiana Code still offers no distinction between the two—even using them interchangeably (i.e. Ind. Code § 31-11-1-1.) Meanwhile, many states have declared considering the sex of a child during custody proceedings unconstitutional—whether within the framework of their state constitution or the United States Constitution.

According to Atkinson, considering the sex of the child raises constitutional concerns in two respects (1983, p. 13-14):

> "First, because it involves the fundamental right to raise one's children and, second, because it presents the issue of whether it is permissible to treat people differently regarding a fundamental right because of sex. In addition to the parent's constitutional rights, it can be argued that children have a due process right to have their custody determinations based on the facts of their case rather than presumptions based on sex."

In fact, in 1994, the Alabama Supreme Court affirmed, what they deemed should be "axiomatic":

> "Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31, 114 S. Ct. 1419, 1422, 128 L. Ed. 2d 89 (1994)

However, important to note: *Stanley v. Illinois* did not make it unconstitutional for U.S. courts to exercise maternal preference in "child custody cases arising out of divorce, but principles declared by the Court in related areas strongly suggest that making presumptions based on sex violates the Constitution" (Atkinson, 1983, p. 13).

While it still may remain constitutional on the federal level, various states, including the aforementioned Alabama, have found it to be unconstitutional in relation to their respective state constitutions. In *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 291 (N.Y. Fain. Ct. 1973), the court found no "compelling state interest" for discriminating on the basis of sex as applied to child custody cases:

> "The 'best interests' of the child might well qualify as such a compelling state interest if, in fact, it were served by the 'tender years presumption'. But since, as has been shown, the presumption does not in fact serve the child's interests, it does not constitute a compelling state interest justifying the different treatment of parents on the basis of sex. Thus the 'tender years presumption' in addition to its other faults, works an unconstitutional discrimination against the respondent."

Still other states, have prohibited sex discrimination statutorily (i.e. Arizona, Arkansas, California, Nebraska, Texas, Vermont), typically with the following verbiage: ""The court in

determining custody shall not prefer a parent as custodian because of that parent's sex" (Vasterling, 1989, p. 925).

True, parent's sex and child's sex are distinct considerations nominally to be sure. However, how different are they truly if when one is typically considered in tandem with the other? What if the consideration of one is typically weighed against its relationship to the other? Considering either can be a "backdoor" to the Tender Years presumption, in such a case. For example, before the state of Texas prohibited the consideration of the *child's* sex and only prohibited the consideration of the parents', courts would assign custody under the pretense of the child's best interest, while simultaneously prescribing to the Tender Years presumption. *See Gay v. Gay*, 737 S.W.2d 94, 96 (Tex. App. 1987).

While it is permissible to "consider the needs of a child of a certain age or gender, consideration of those needs does not provide an automatic answer to the question of which parent can better meet those needs" (Atkinson, 1983, p. 13) In practice, however, there are many cases which corroborate the tendency for a child's and parent's sex to be considered concurrently—as if parent's sex automatically better qualifies them to fulfill a child's needs. In Maryland, the other state that mandates the consideration of the gender/sex of the child, one such case is on record. In 1998, the Court of Appeals of Maryland reversed a trial court's decision to place a three year old girl with her mother, "solely because she had a female hand and that female child of a certain age had particular and specific need to be with her same sex parent." *Giffin v. Crane*, 716 A.2d 1029, 1036 (Md. Ct. App. 1998) In the opinion of *Giffin v. Crane*, Chief Justice Bell held, similar to Justice William G. Conover in *Adoption of Thomas*, sex discrimination in child custody cases is "suspect" and in opposition to Maryland's Equal Rights amendment. 716 A.2d at 1037.

Another example of the implicit (and sometimes explicit) biases judges bring to the bench, comes from *Dalin v. Dalin*, 512 N.W.2d 685, 689 (N.D. 1994). In the opinion, the appellate court asserts that the trial court's decision was made with "improper gender bias," citing the trial court's questioning of the mother of the father (Roland):

> "THE COURT: *In the event Rollie were the primary custodian, and in the event there [were] certain things in [the child's] training that might best be done by a woman, would it be your anticipation that you would be the teacher?*
>
> "THE WITNESS: *No, Rollie is the teacher. And I just help him*[.]
>
> "THE COURT: *Getting back to my question, in the event there are certain things that a girl should learn that [are] easiest to learn from a woman, would you be anticipating that you would be that woman?*
>
> "THE WITNESS: *Yes.*"

Though the judge made his decision "in the best interest of the child," he was able to evoke the Tender Years presumption by means of considering the relationship between the sex of the child and sex of the parent. This phenomenon was not exclusive to this case, this decade (1990s), nor the state of North Dakota.

In 1980, the Supreme Court of Iowa heard a similar case—illustrating that the tendency to use the sex of the child or of the parent to evoke gender-biased rulings based on the tender years presumption is not isolated. The court critiqued the trial court's holding that Jim, the father, "will be able to engage in various activities with the boys, such as athletic events, fishing, hunting, mechanical training and other activities that boys are interested in" despite there being no evidence presented to the court to support that statement. *In re Marriage of Tresnak*, 297 N.W.2d 109, 112 (Iowa 1980). The trial court, instead, presumably relied upon its preconceived gender stereotypes and gender roles. Contradicting this, the appellate court ruled that "neither parent has an edge on the other based merely on sex." *Id.* Further concluding that "[i]t logically

follows that neither parent has an edge on the other based on the sex of the children either. We reject the idea that any a priori notion of parental fitness should be based on the sex of parent or child. *Id.* at 112-13.

Not only can this tendency be evidenced in various states across time, it can also be attributed directly to the state of Indiana itself because of research conducted during the late 1990s the by aforementioned DePaul professor Dr. Julie Artis. In the process of interviewing 25 Indiana judges, Artis found that the judges "nearly unanimously agreed that the statute is not restrictive at all" (2004, p. 790). Reinforced by multiple judges saying that "they would not share these opinions in public", Artis believed she fostered an environment that encouraged the judges to speak candidly, because she provided them confidentiality and conducted in-depth, face-to-face interviews, (2004, p. 780). In regards to the judges feelings about the Tender Years doctrine,

> "[T]en judges expressed some level of support for the automatic award of infants to mothers. However, when asked to consider the hypothetical case involving an infant, four additional judges-judges who earlier responded that they do not use the tender years doctrine-invoked the tender years doctrine. Thus, more than half of the judges supported the idea of the tender years doctrine" (Artis, 2004, p.783).

Further, male judges were much more likely (72% to 17%) than female judges to utilize the tender years presumption when issuing a child custody ruling—a difference found to be "statistically significant even though the sample is small" (Artis, 2004, p. 791-92). This occurrence is likely tied to the fact that women are more likely to subscribe to egalitarian parenting views, whereas men are more likely to subscribe to more traditional views (Artis, 2004, p. 791). While the culture of the courts have likely changed since the late 90s, it is interesting to note that the percentage of women has changed by less than ten percent (14% to 23%) in nearly two decades (Statistical Review of Current Indiana Trial Court Judges, 2016).

In sum, the consideration of child's sex when determining child custody, to quote *Matter of Adoption of Thomas* is "suspect." 431 N.E.2d at 513. It likely allows Indiana judges a "backdoor" to the Tender Years doctrine (Atkinson, 1983, p. 13), which is a standard proven not to be in the child's best interest. *Watts*, 350 N.Y.S.2d at 291. Not only does § 31-14-13-2 (a) contradict the gender-neutral intent of BICS, it also has been found unconstitutional or is forbidden statutorily in many other states. This alone is enough to question its merit in the Indiana Code, but is there merit to distinguishing the sex of the child from a child development standpoint? Are boys and girls truly so different that they have different enough needs to justify such a standard? If so, can such needs only be fulfilled by certain parents? The next part of this paper will attempt to address these queries.

Part Two:

In the Best Interest of Child Development

Judges, though experts in the law, are rarely also experts in child development. As such, the state of Indiana, along with many other states, provided more specificity to its judiciary regarding the best interest of the child statute. The factors provide an outline, not a comprehensive guidebook to the courts. Indiana Code dictates not *all* factors that the judge will consider, but rather serves as a reminder to those that the judge *should* and *must* consider. Those factors enumerated in § 31-14-13-2 are chosen, presumably, because they are accepted as considerations crucial to ensuring the well-being of the child. As previously established, the state provides no weighted value to each criterion; therefore, judges are allowed the discretion to consider all factors with equal weight or even assign value to each component as they see fit.

When evaluating the statute, each criterion must be considered: why is it weighed and to what end? When appraising the merit of contemplating a child's "sex" as dictated by § 31-14-13-2 (a), however, more specific questions are raised. How is "sex" being defined operationally? Are boys and girls truly so different that taking their sex into consideration is paramount to appropriately deciding what is in their best interest? Are the aspects critical to their well-being different enough to justify its consideration? Are individuals of a particular sex similar enough to one another to consider their needs as generalizable?

As has been established, in practice, the sex of the child is rarely weighed in isolation. Often it is considered in concert with the sex of the parent(s). Can the, perhaps, distinct needs of boys and girls only be fulfilled by an individual of a specific sex? Does sex composition of a child-parent relationship matter? For example, are daughters better suited to custody with their mothers based of off the needs hinged upon their sex and what a mother can provide based off of hers?

Finally, how are judges compelled to rule when presented with such a criterion? Are they capable of objectivity, or do implicit biases hinder their ability to decide with impartiality? As presented in the previous section, many judges have applied this factor by placing children with the parent of the same sex. Are these decisions based upon the evidence presented on a case-by-case basis or because of preconceived beliefs held by the court?

I. Are boys and girls that different?

According to countless public opinion polls and studies, Americans certainly think they are. Before a child is even born, gender stereotypes are already pushed onto them. From the moment one is told whether the fetus is a boy or a girl, schemas are activated. A schema is a "knowledge-unit that tells [individuals] how to react to a particular stimulus" (Nelson, 2015, p. 215). Parents rate female fetuses as "softer, littler, calmer, weaker, more delicate, and more beautiful than male fetuses" (Sweeney & Bradbard, 1988, p. 397). Research examining parental perceptions directly following childbirth revealed that "parents of boys and girls had already begun to view their infants differently"—perceiving "daughters as softer, finer featured, more awkward, more inattentive, weaker, and more delicate" and sons as "firmer, larger featured, better coordinated, more alert, stronger, and hardier" (Rubin, Provenzano, & Luria, 1974, p. 513 & 517). Despite significant difference in perception, objective measures (i.e. weight, length, and Apgar scores)

of the babies indicated no statistically significant difference (Rubin, Provenzano, & Luria, 1974, p. 515).

On average, gender stereotypes are applied to any given person from the womb to the grave. Moreover, despite contemporary advances in how various sciences have come to understand both sex and gender on a spectrum, Americans still perceive the world in rather

straightforward dichotomies. In 2017, the Pew Research Center conducted public opinion polls regarding perceptions of gender differences. Their results showed that a predominance of Americans feel that "men and women are basically different" (Parker, Horowitz, & Stepler, 2017). More specifically, they found that Americans feel that men and women "express their feelings" different, manifest different physical abilities, take personal interest in distinct domains, and, most applicable to the study at hand, have inherently different approaches to parenting (Parker et al., 2017). Important to note: the study was unable to find consensus on the origins of these differences. Interestingly, the difference in opinion was divided largely by gender; men were more likely to attribute these distinctions to biology, whereas women were more likely to attribute these discrepancies to societal expectations (Parker et al., 2017).

Though this study wasn't aimed specifically at perceptions of distinctions between males and females during childhood, it logically follows that the perceptions are generalizable as no limited age group was specified in the questions posed. These views are unsurprising, especially when historical and contemporary context are considered. Just like our predecessors, a high premium has been placed on maintaining distinctions between males and females. Currently, these divides can be seen clearly pervading many aspects of daily life. From different sports leagues to his and hers versions of nearly any commercial product, the lines are drawn. However, these distinctions are not only deeply embedded in the "subjectivity" of culture, they also find a home in the "objectivity" of academia. Psychology as a discipline has been particularly enamored by gender differences since its formalization in during the late 19th century (Shields, 1975, p. 741).

According to a literature analysis conducted to determine trends in gender development research during a 35 year period (1975-2010), the most frequent topic area "across all years was

Gender Differences" (Zosuls, Miller, Ruble, Martin, & Fabes, 2011, p. 9) in *Sex Roles*, a "global, multidisciplinary, scholarly, social and behavioral science journal" ("Sex Roles", 2018). In fact, more than half of the articles published in *Sex Roles* dealt directly with gender differences (Zosuls et al., 2011, p. 9). Moreover, this emphasis on differences between males and females was not singular to *Sex Roles*, but rather "mirrored research in the field more broadly" (Zosuls et al., 2011, p. 9). More recently from the 1990s through the 2000s, a downturn in this topic area has been observed (Zosuls et al., 2011, p. 9)—perhaps indicating a slight decrease in interest of this topic or a shift from interest in whether or not differences are present to why they are.

This paper will focus mainly on gender difference as "sex" is used operationally in Indiana to mean something beyond strictly biological difference. That said, Indiana courts seem to use the terms interchangeably, so the overemphasis of both could prove impactful to the court's decision.

Historically, many studies have indicated that gender and sex differences exist across various domains; however, more recent reports indicate that these disparities have been overemphasized. Psychological theories regarding gender differences used to find most of their grounding in biology. That is, earlier research held that disparities between males and females were based on biological differences—what today might be referred to as "sex differences." These arguments grounded in biology "have long been advanced to justify gender inequality" (Zosuls et al., 2011, p. 4), which conveniently benefited those with the most power in society as well as a predominance of those conducting said research.

Furthermore, across disciplines, a "bias against reporting negative or null results" pervades (European Commission, 2013, p. 48). According to an article published by the

University of Pennsylvania which synthesized previous research done regarding publication bias, studies are less likely to be published if the statistical significance found is greater than .05 (Hubbard & Armstrong, 1997, p. 2). Essentially, as it applies to the research of gender difference, this means that researchers are hard pressed to get their work published if they find no divergence. Consequently, researchers feel pressure to construct research focusing on difference rather than similarity.

This bias has led to a rise in researchers asserting gender differences, even in the absence of sufficient evidence or documentation. For example, a "review of peer-reviewed papers reporting 'sex-related differences in genetic associations' found that 'most claims were insufficiently documented or spurious'" ("Overemphasizing Sex Differences as a Problem", 2013). Counterfeit reporting is just one small component of how negligent reporting affects the overemphasis of gender difference. More often, researchers inappropriately attribute difference to sex, overlooking other factors that could be confounding such as "gender roles or socioeconomic status" ("Overemphasizing Sex Differences as a Problem", 2013).

More recently, speculation surrounding the "usefulness" of placing such a high premium on statistical significance has been raised in psychology and various other disciplines (Hubbard & Armstrong, 1997, p. 2). Even the American Statistical Association (ASA), has issued a warning on the reliance of p-values which are often "misinterpreted and misused" (Wasserstein & Lazar, 2016, p. 129). "[T]esting hypotheses by statistical analysis" is an approach characterized by "numerous deep flaws" not limited to misunderstanding, misleading, and a lack of reproducibility (Wasserstein & Lazar, 2016, p. 129).

The acknowledgment of the overemphasis regarding both gender and sex differences is integral to understanding the evolution of results concerning those differences from the past until

now. Moreover, this overemphasis likely has tangible effects on a judge's conception of what is and what is not in the best interest of a certain child. The overstating of differences between the genders and sexes has led to increased stereotyping of men and women (European Commission, 2013, p. 48). Studies which contribute to this trend "have sometimes lead to discriminatory practices" (European Commission, 2013, p. 49). Certain legal standards discriminated based off of gender stereotypes. For example, research in the past asserted that women are better caregivers and parents because they are inherently more nurturing (Chodorow, 1978, p. 11). Because of this, men were less likely to retain custody of their children, especially when they were young. This principle, known as the Tender Years Doctrine, was the legal predecessor to the Best Interest of the Child standard. Inflating gender and sex differences, though understandable given historical trends and prevailing research constructs, has broad negative consequences that extend outside of academia.

Today, the gender similarities hypothesis, advanced by researcher Dr. Janet Shibley Hyde, has gained significant traction. Unlike many in the past who have asserted drastic gender difference, Hyde poses that males and females are actually more alike than they are different. She arrived to this conclusion after conducting a meta-analysis of 46 meta-analyses (2005, p. 581). Meta-analysis is "a statistical method for aggregating research findings across many studies of the same question" (Hyde, 2005, p. 582). From the broad range of samples from each of the 46 meta-analyses reviewed, Hyde was able to conclude that from childhood through adulthood males and females are more alike than they are different on most, albeit not all psychological variables (2005, p. 581). Notable exceptions, or domains in which discrepancies are moderate or large in significance, include motor performance, "some—but not all—measures of sexuality", and aggression (Hyde, 2005, p. 586). Given the bias against publishing null

results, this meta-analysis is, if anything, an overestimation of gender differences as the sample probably did not contain any studies showing no-difference.

These detected differences are not static. Rather gender differences change throughout one's lifetime as they are heavily dependent on age and context (Hyde, 2005, p. 581). Context has the ability to "creat[e], eras[e], or even revers[e] psychological gender differences" (Hyde, 2005, p. 588). For example, she discussed the phenomenon of *deindividuation*, which "refers to state in which an individual has lost his or her individual identity" (Hyde, 2005, p. 588). When such circumstances occur that allow an individual to be anonymous, they are able to go off their social script—meaning they are able to stop acting in the way they are expected to given their identity. One way to think of this is how one is expected to behave a certain way at work; however, those expectations go away once you shed that identity by going off the clock, changing out of your uniform, etc. In studies which have emulated this sort of environment, "no significant gender differences" were found (Hyde, 2005, p. 589). This phenomenon would indicate that gender difference are constructed contextually and are not inherently essential.

Additionally, Hyde addresses how "interpretation of effect sizes is contested" (2005, p 586). It matters not just that there is a difference. How big is the difference and what is the overall implication of that difference? Expanding upon Hyde's work, Dr. Diane Halpern, a professor at Claremont College and then-president of the American Psychological Association asserted that even when differences are found, they should not be taken at face-value as they could be used to justify "prejudicial beliefs and discriminatory actions" (American Psychological Association, 2005). Rather than focusing on the differential, she advocates that one wonder not just if the results are statistically significant, but also if they are meaningful (American Psychological Association, 2005). Applying this holding to the research at hand, statistically

significant differences found between boys and girls are not enough alone to be considered. One must understand the magnitude of difference and the implications those differences have. For example, if, as established in Hyde's research, boys are more aggressive than girls: how much more aggressive are they and would one parent be better equipped to handle this trait?

Hyde's research is reinforced by several other studies (Costa Jr., Terracciano, & McCrae, 2001; Else-Quest, Hyde, Goldsmith & Van Hulle, 2006; Zell, Krizan, & Teeter, 2015; Siegling, Furnham, & Petrides, 2015; Maccoby, 1990) that advance results aligned with her hypothesis—two of which are also meta-analyses. The replicability of her results on such a large scale corroborate her hypothesis. Moreover, the additional studies provided greater breadth to her assertion that males and females are basically the same.

For example, the meta-analysis carried out by Costa Jr. et al. contained a sample of both college-age and adult individuals from 26 cultures ($N = 23{,}031$) (2001, p. 322). Results revealed that cross-culturally "gender differences are small relative to individual difference within genders" (2001, p. 322). Another meta-analysis conducted by Else-Quest et al. tested 35 dimensions of temperament in children ages 3 months to 13 years of age, finding that there were generally only small gender differences, if any, though there were a few notable exceptions—namely, effortful control (higher in girls) and surgency (higher in boys) (2006, p. 60). Moreover, this study reinforced Hyde's assertion that gender differences varied as a function of age (Else-Quest et al., 2006, p. 61). Their moderator analyses (or analyses that determine the extent a variable other than the independent variable is affecting the dependent variable) "indicated that gender differences… were greater in school age children" likely due to the fact they had attained "more cumulative exposure to socialization" (Else-Quest et al., 2006, p. 62). However, even

though these differences increased in older children, most of them were still considered small (Else-Quest et al., 2006, p. 60).

All of the studies cited (parenthetically and explicitly) underscore the significant influence of context on measured gender difference. Differences "emerge primarily in social situations and their nature varies with the gender of dyads and groups" (Maccoby, 1990, p. 513). In fact, the differential between boys and girls is "minimal when children are observed or tested individually" (Maccoby, 1990, p. 513). Even when differences are measured, the variance between males and females is less than the variance within one gender (Maccoby, 1990, p. 513)—meaning that on average a girl is more likely to be more different than another girl than she is a boy. Both sex and gender appear too broad of ranges to be considered as good indications of a child's personality and disposition. As such, the research would indicate that considering a child's identity as a function of their categorical sex is unwise and unfounded based off empirical evidence.

Furthermore, many studies suffer from racial biases as samples are generally predominantly white. According to the concept of *intersectionality*, "gender effects can never be understood in isolation and must always be examined in context" (Hyde, 2014, p. 21). While context as external factors has already been explored, the interplay with internal factors has yet to be established. Internal factors could include other identities an individual holds such as race, ethnicity, religion, or socio-economic status. While all of these can affect the manifestation of gender, this paper will focus on race as a case study to prove the extreme variability of gender as a category.

When gender is measured in concert with race, the variation measured within one gender increases. A 1999 meta-analysis on gender differences in self-esteem revealed that, on average,

the gender difference was $d = 0.21$, signaling a slight difference favoring males (Hyde, 2014, p. 17). However, when race was cross-analyzed, "the magnitude of the gender difference was $d = 0.20$ among whites but −0.04 among blacks" (Hyde, 2014, p. 17). Meaning that even the small difference between white males and females was nonexistent between males and females who identified as Black. In a meta-analysis aggregating studies on gender differences in mathematical performance, gender difference only existed for individuals who identified as White ($d = 0.13$) (Hyde, 2014, p. 19). The male advantage did not translate to those who identified as Black ($d = -0.02$), Hispanic ($d = 0.00$), or Asian American ($d = -0.09$) (Hyde, 2014, p. 19). A meta-analysis by Else-Quest et al. looking at gender difference in self-conscious emotions showed a similar result. The difference between males and females who identified as White was larger than the difference between non-White males and females. The overall finding of $d = -0.29$ was skewed significantly by the large difference between White individuals ($d = -0.32$) even though the difference for non-White individuals was only $d = -0.06$ (Hyde, 2014, p. 19).

These results not only further corroborate the gender similarities hypothesis posed by Hyde, they also underscore the variability within one gender. Identities, such as gender, do not manifest in isolation. As evidenced above, race plays a significant role in gender differences measured. Furthermore, race is just one of many variables that has such an effect (Shields, 2008, p. 302). Because "the formation and maintenance of identity categories is a dynamic process," considering "sex" as a static factor into the consideration of a child's wellbeing is misguided and ill-advised. Unless Indiana courts are dictated to consider all factors that could affect one's gender identity, they will be unable to make responsible inferences based off this identifier. Moreover, even if the court's tried to do so by adding in factors such as race, compiling an exhaustive list of all factors relevant would be impossible.

II. Are boys' and girls' needs different?

Parenting is often referred to as the hardest job in the world. Though it's accepted as such due to myriad factors, perhaps the primary reason is that there is no one guide on what the job entails, what needs to be accomplished, nor best practices along the way. This ambiguity leaves both parents and family courts considerable uncertainty. Due to the range of parenting styles avowed, this paper will review three commonly accepted approaches to parenting—all of which have been extensively researched. These three methods (attachment theory, stability theory, and good enough parent theory) will provide a case study of currently accepted notions of what children need from their parents.

In the early 1940s, British psychologist John Bowlby laid the foundations of attachment theory (Cassidy & Shaver, 1999, p. 3). Based upon "observations he made when he worked in a home for maladjusted boys," attachment theory's original position held that the mother-child relationship was critical to both the long-term and immediate well-being of the child (Cassidy & Shaver, 1999, p. 3). Based off of specific observations of two boys "both of whom had suffered major disruptions in their relationships with their mothers," Bowlby's work honed in on the mother-child relationship—seeking to understand why the mother alone was so important to the child (Cassidy & Shaver, 1999, p. 3).

Originally, it was hypothesized that this relationship was special because the mother fed the child; however, later empirical research contradicted this holding (e.g. some infant geese would become attached to "parents—or even objects—that did not feed them") (Cassidy & Shaver, 1999, p. 3). In later iterations, he hypothesized that the distinct nature of this relationship was due to a basic instinct towards survival: "Genetic selection favored attachment because they

increased the likelihood of child-mother proximity and thereby child survival" (Cassidy & Shaver, 1999, p. 4).

"One of the most popular and empirically grounded [parenting] theories" today, attachment theory holds that "attachment" is just one of many aspects relating to the tie between caregiver and child (Benoit, 2004, p. 541). This dimension of their relationship makes the child feel "safe, secure and protected" (Benoit, 2004, p. 541).The primary overarching principle of attachment theory "is the need of a child to develop a relationship with at least one primary caregiver for healthy emotional and social development to occur" (Benware, 2013, p. *iii*).

Though a bulk of previous attachment theory research has paid disproportionate attention to the mother-child relationship, while curtailing that of the father-child, contemporary theory does not draw distinctions between mother-child and father-child relationships (Cassidy & Shaver, 1999, p. 64). The theory delineates four factors believed to be most impactful on the level of attachment in a given relationship—none of which are dependent on the gender nor sex of the parental figure (Cassidy & Shaver, 1999 , p. 15).:

> "(1) how much time the infant spends in the figure's care;
> (2) quality of care each figure provides;
> (3) each figure's emotional investment in the child;
> (4) social cues"

Research indicates that infants are likely to form more than one attachment, which would indicate that the mother-child relationship is not singular in its characteristics (Cassidy & Shaver, 1999, p. 14). In fact, children are "very likely to form an attachment with their father, even if the interaction with the father [is] rather infrequent" (Cassidy & Shaver, 1999, p. 14). More recent work has advocated a "family perspective of attachment" in hopes of ridding attachment theory of the gender politics which have plagued it throughout its evolution (e.g., Belsky 1996; Cowan, 1997).

Similar to attachment theory in that it seeks to provide children with a sense of security, other researchers hold that stability is the most crucial element to child well-being. Many policies (e.g. America's Report Card Advisory Board, 2012; "Educational Stability for Children and Youth in Foster Care," 2018; Allen & Bissell, 2004) and research (e.g. Hartnett, Leathers, Falconnier, & Testa, 1999; Dregan & Gulliford, 2011; Howes, Hamilton, & Phillipsen, 1998) reinforce its importance. There are different types of stability: parental, marital, educational, placement, financial, etc. These and others all play a role in a healthy child development (Wood & Kennison, 2015).

Children develop best in "stable and nurturing environments where they have a routine and know what to expect" (Sandstrom & Huerta, 2013, p. 5). According to a study by Urban Institute, "instability" is best understood as "the experience of abrupt, involuntary, and/or negative change in individual or family circumstances" (Sandstrom & Huerta, 2013, p. 10). When children are exposed to circumstances which undermine their sense of stability, they experience undue stress (Sandstrom & Huerta, 2013, p. 5). Parents are necessary to act as a "buffer against negative effects of instability" (Sandstrom & Huerta, 2013, p. 5).When they fail to serve in this protective capacity, the "unbuffered stress" children are exposed to has significant negative impacts on their mental health and cognitive functioning (Sandstrom & Huerta, 2013, p. 5). Research draws no line between the stability provided by males and females. As such, stability can be given to children effectively regardless of parent gender.

Some have even proposed that too much pressure has been put on the practice of how to parent best. Instead of exerting efforts to determine the premier parenting method, some assert that the best parent isn't the perfect parent, but rather is just 'good enough" (Gray, 2015). In its original iteration, this theory explored the "good enough mother"; however, it was expanded by

Bruno Bettelheim in his 1987 publication, *A Good Enough Parent* (Gray, 2015). A "good enough parent" is "more concerned with the child's experience of childhood than with the child's future as an adult" (Gray, 2015). By focusing on the present, parents are capable of eliminating the stressors relating to the future. Instead, they focus on the immediacy of utilizing "conscious reflection, maturity, and empathy" while interacting with their children (Gray, 2015). This approach recommends that parents give their children only what they want and need, but nothing more (Gray, 2015).

Like the previous two parenting theories, the "good enough parent" approach does not specify the importance of parent gender nor sex. These case studies, mirroring seminal pieces of research more generally, do not (or, specifically, do not currently) indicate that there are any differences in a child's needs dependent upon sex or gender. These findings hold true when applied more specifically to children's needs post-divorce (Sigal, Sandler, Wolchik, & Braver, 2011, p. 121). According to a meta-analysis of 63 studies, the same factors (feelings of closeness and authoritative parenting) were strongly correlated with positive benefits for children of divorce—regardless of gender and age (Amato & Gilbreth, 1999, p. 559). Authoritative parenting is caregiving characterized by high demands and high responsiveness. Another meta-analysis covering 37 studies ($N > 81{,}000$) found that differences between male and female children were not significant in terms of psychological well-being (Amato & Keith, 1991, p. 55). The results indicated "most of the disadvantages associated with divorce are similar for boys and girls" (Amato, 2001, p. 365).

As established in Part One, promoting the child's well-being is the principal concern of "best interests of the child" determinations ("Determining the Best Interest of the Child", 2016, p. 2). Through the advancements in researchers' understanding of child development, a

consensus has been reached that well-being is a multi-dimensional concept, including "physical, emotional, and social" aspects (Statham & Chase, 2010, p. 5). Limited knowledge is available regarding how well-being may or may not vary as a function of variables like gender and sex (Statham & Chase, 2010, p. 5); however, of the information presently available, the needs of boys and girls are generally similar ("How Does Divorce Affect Girls and Boys Differently?", 2018).

Instead of looking at the child's gender in hopes that it will reveal relevant details conducive to their well-being, a better indicator is the "quality of parenting provided [to] them" (Kelly & Emery, 2003, p. 356). Parenting characterized by "high support and high control" can serve as a "protective factor" for children (Bastaitis & Mortelmans, 2016, p. 2178). A *protective factor* or *moderator* is any element that mitigates stressors exacted on children during or after a divorce (Amato, 2000, p. 1271). Studies examining protective factors (i.e. Kelly & Emery, 2003; Amato, 2000; Bastaitis & Mortelmans, 2016) illustrate that the most critical protective factors are reliant upon the parent(s) involved, rather than the demographics of the child. For example, the psychological adjustment of each parent is one of the best predictors of child well-being post-divorce (Bastaitis & Mortelmans, 2016, p. 2178). No evidence has been found to indicate that women and men experience statistically significant differences in psychological distress post-divorce (Amato & Booth, 1991, p. 402). A meta-analysis of 33 studies found that children raised through joint custody rather than sole custody adjusted better post-divorce (Bauserman, 2002, p. 91).

In sum, considering the gender of the child as indicative of certain needs or characteristics when determining a child's best interest post-divorce is not grounded in empirical research. Boys and girls are affected by and adjust to divorce in similar ways (Lansford, 2009, p.

143)—in fact, some studies report no gender differences (e.g. Amato & Cheadle, 2005; Sun & Li, 2002). However, as established in *Gay v. Gay*, 737 S.W.2d 94, 96 (Tex. Ct. App. 1987), considerations of child's sex/gender are often weighed in tandem with considerations of parents' sex. Clearly, boys and girls aren't that different, but are mothers and fathers? Is one gender better suited to caring for children? Is mothering different than fathering?

III. Does parent gender matter?

The majority of the American public opines that mothers and fathers parent in "basically different" ways (Parker et al., 2017). Even though gender roles have become less restrictive, most still believe that mothers are "better equipped than fathers to care for a child" (Livingston & Parker, 2017). While the public is prone to overemphasizing gender differences, many studies have corroborated these presumed gender differences relating to parenting style (McKinney, Brown, & Malkin, 2017, p. 290). However, these traditional perceptions stem from research studying married mothers and fathers only (Biblarz & Stacey, 2010, p. 4). Most, though not all, research based off of married couples arrives at a common conclusion: "Most married wives exceed their husbands relatively and absolutely on time spent in child care and domestic work and on most types of interaction with their children" (Biblarz & Stacey, 2010, p. 4). It is hardly surprising that women "are more likely to commit to children, relationships, and homemaking"; however, it would be erroneous and simplistic to assume that these differences are directly correlated to simply sex or gender (Biblarz & Stacey, 2010, p. 5). Rather, these differences pervade given societal presumptions that women are better caregivers as well as numerous societal structures (e.g., maternity leave more available than paternity leave and changing rooms more likely situated in women's restrooms). Factors such as these could encourage or push males and females into certain roles when both are present. However, single parents are not necessarily

expected to fit into those roles. Because a predominance of these studies have been conducted on married, co-residing mothers and fathers, other factors such as sexual orientation and family structure could be contributing to the average differences.

To test whether these differences are intrinsically tied to sex or gender, research on same-sex couples and single parents have become more prevalent. After all (Dufur, Howell, Downey, Ainsworth, & Lapray, 2010, p. 1094):

> "If mothers and fathers parent in substantially different ways, children raised by gay or lesbian parents should experience some of the same predicted shortcomings children in single-mother and single-father families would; in each of these cases, children lack the influence of a parent of a particular sex."

A 2007 meta-analysis compared outcomes for children of same-sex parents to those for heterosexual parents (Crowl, Ahn, & Baker, p. 385). Across the 19 studies reviewed, children cared for by same-sex parents "fare[d] equally well" to those raised by heterosexual couples in terms of developmental outcomes and quality of parent–child relationships (Crowl et al., 2007, p. 394). These results are not singular to this study (e.g. Adams & Light, 2014; Patterson, 1992); however, research on same-sex couples remains fairly limited (Crowl et al., 2007, p. 399).

More research has been conducted on single parent family structures. One study of 3,509 single mothers and single fathers found that on 22 out of 32 outcomes (e.g., parenting attitudes, parenting style, and parental involvement in school) no significant differences between males and females presented (Dufur et al., 2010, p. 1101). Out of those which were significant, several of the variables were "very close to non-significance" (Dufur et al., 2010, p. 1101). The researchers note that the large sample size might have made some variables more likely to be statistically significant despite not being particularly meaningful (Dufur et al., 2010, p. 1101). For example, the difference for "negative feelings about parenting" was statistically significant, but the difference found was less than a .01 ($m = 0.079$, $f = 0.073$) (Dufur et al., 2010, p. 1100).

Through a review of 81 studies published from 1990-2010, Timothy Biblarz and Judith Stacey were able to summarize the results of relatively recent studies regarding the importance of parent gender (2010, p. 6). From reviewing these bodies of work, Biblarz and Stacey concluded that "family structure modifies [gender] differences in parenting" (2010, p. 17). Studies signaled that single parents were more likely to adopt parenting styles typically associated with the opposite gender role. For example, single fathers "displayed some 'maternal' capacities" (Biblarz & Stacey, 2010, p. 16). Not present in married heterosexual fathers, it was hypothesized that they adapted their parenting style when a woman was not present to fill such a role (Biblarz & Stacey, 2010, p. 16). On average, single fathers "scored higher on parenting scales, did more housework, and enjoyed warmer, more verbal relations with their children than married fathers" (Biblarz & Stacey, 2010, p. 16). Conversely, married heterosexual fathers often scored the lowest in the domains listed above (Biblarz & Stacey, 2010, p. 16). They did, however, "improve notably when faced with single or primary parenthood" (Biblarz & Stacey, 2010, p. 17). Just as single fathers seem to adapt elements of "mothering," the inverse may also hold true. According to their literature review, "[s]ingle-sex parenting seems to foster more androgynous parenting practices in women and men alike" (Biblarz & Stacey, 2010, p. 17). Women are more apt to adopt "conventional paternal practices" when faced with single parenthood (Biblarz & Stacey, 2010, p. 17).

Research on same-sex couples and single parents offers a compelling case for gender differences being dynamic. Since they are virtually non-existent in single parents, it does not make sense to assume gender differences in a parent post-divorce. Beyond that, more recent research of married heterosexual couples has also reinforced the negligibility of gender

differences in parenting. One such study observed the interaction of 237 mothers, fathers, and their 2-year old children (Ryan, Martin, & Brooks-Gunn, 2006, p. 211). The results revealed that "mothers and fathers exhibited similar parenting patterns" (Ryan et al., 2006, p. 211). The most important variable to positive child cognitive outcomes was having at least one "supportive" parent—regardless of that parent's gender (Ryan et al., 2006, p. 211). Being *supportive* is characterized by "warmth, stimulation, involvement, and responsiveness" (Ryan et al., 2006, p. 212).

The research discussed earlier by Biblarz & Stacey (2010) extended beyond a review of single-parents. Based off of their review, "no evidence of gender-based parenting abilities"—'expectation of lactation' excluded—was found (Biblarz & Stacey, 2010, p. 4). Furthermore, they asserted "very little about the gender of the parent has significance for children's psychological adjustment and social success" (Biblarz & Stacey, 2010, p. 3).

Even if small gender differences do exist in some contexts, it does not mean that one gender is inherently better equipped to parent. Though it is still true that "mothers tend to be more involved than fathers" (Hawkins, Amato, & King, 2006, p. 133), it remains important to remember quantifying the time fathers spend with their children "may not be a good indicator of their emotional involvement with [them]" (Finken & Amato, 1993, p. 580). Mothers and fathers can invest in their children in different ways. When a parent works, they might spend less time with their child, but they are still providing support economically.

Research on gender differences in parents indicate that gender differences, when present, are generally small. Like other gender differences, "parenting differences between families often exceed gender differences within families" (Biblarz & Stacey, 2010, p. 4). Because gender differences in parenting vary, it can be concluded that these differences are not inherent, but

rather contextually constructed—often by family structure. It has been established that gender differences in children as well as their parents are not significant enough to consider in isolation. However, the dynamic of specific parent-child sex compositions as distinct relationships has yet to be addressed. Is there merit in considering them in conjunction as is often done in legal application of the best interest of the child standard?

Many claims have been made and theoretical support has been offered for the belief that parent-child sex composition matters (Russell & Saebel, 1997, p. 139). However, these claims find minimal reinforcement in empirical research. One study examining the distinct nature of four dyads (mother-daughter, mother-son, father-daughter, and father-son) resulted in evidence that "did not substantiate the proposition of four distinct parent–child relationships" (Russell & Saebel, 1997, p. 139). Their research, instead, exposed differences that were "small and unreliable" (Russell & Saebel, 1997, p. 139). Another study also found very little difference between the four dyads and when differences (e.g., nurturance and warmth, parenting roles and behaviors, and parental monitoring) were found, the effects were "very small" (Harris, 2006, p. 72). The fact that these reports were based off of self-report is noteworthy as larger gender differences are typically measured in such circumstances.

Again, context matters for the uniqueness of parent-child sex composition. The importance of "children resid[ing] with same-gender or opposite- gender parents" is negligible (Amato, 2000, p. 1281). If gender differences between children, their parents, and their unique relationships is inconsequential, why then do courts act as though they do? Are the courts even aware that they are acknowledging such distinctions?

IV. Judges, Litigators and their Biases

Gender, one of the most "biologically primitive and important social categories", is the "first social category that humans are able to discriminate" (Lenton, Bruder, & Sedikides, 2009, p. 183). As early as age two, children develop their first stereotypes—many of which are gender-related (Lenton et al., 2009, p. 183). Gender stereotypes, unlike other stereotypes, are commonly accepted as "natural, inevitable, and fair" due to their complementary nature—what one lacks, the other has in abundance (i.e. Men are perceived to be logical and women are not, but women are perceived as nurturing and men are not) (Jost & Kay, 2005, p. 499).

Based off of these stereotypes, individuals develop biases. Biases are essentially prejudices which lead one to favor one entity over another. In the past, biases based off of gender stereotypes manifested more explicitly; today, however, "discrimination has largely shifted from overt and intentional to convert and unintentional" (Hyman, 2014, p. 41). As such, research regarding *implicit biases*, or "biases that unconsciously shape our cognition and subsequent action," has grown in recent years (Simmons, 2016, p. 35).

Social sciences have arrived to a consensus that every individual possesses bias (Scopelliti, et al., 2015, p. 2468). The inherent issue is not the bias itself, but rather a lack of recognition (Scopelliti et al., 2015, p. 2468). In other words, bias is not necessarily the problem, but rather the fact that it is often subconscious or implicit. In general, "people exhibit a tendency to believe they are less biased than their peers" (Scopelleti et al., 2015, p. 2468). Research conducted by faculty from Carnegie Mellon University and the University of London found that just as everyone has bias, they also suffer from a "bias blind spot" (Scopelleti et al., 2015, p. 2469). In fact, of the 661 individuals tested, only one admitted to being more biased than the average person despite evidence to the contrary (Scopelleti et al., 2015, p. 2479). As one would imagine, this occurrence is not uncommon. Individuals "frequently" self-report lower levels of

bias than "their actual measured bias" (Hyman, 2014, p. 42). Individuals are not likely being intentionally dishonest, they simply are "unable to know the contents of their mind" (Kang & Banaji, 2006, p. 1071).

Research on implicit biases informs several of these "subconscious associations are so strong...even the brightest among us are prone to unwittingly rely upon them"—at times compromising the truth (Simmons, 2016, p. 35). Even when one brings the best intentions, implicit bias "subconsciously shapes" the way we regard others and what we do with that information (Simmons, 2016, p. 36). As such, though one might not resolve to discriminate, decisions are often rationalized via implicit bias which can account for "unconscious adjustments in our assessment criteria" (Simmons, 2016, p. 36).

Of course, there are no laws forbidding the average person from simply harboring these biases. Those in the legal field, however, are held to an elevated standard (Ream & Hearing, 2015, p. 2). Citing the 14th Amendment of the United States Constitution, the Supreme Court has ruled that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). They further defined fairness as "an absence of actual bias in the trial of cases" *Id.* The Code of Conduct for United States Judges, Canon 3 (C) (1) (a), which applies to federal judges, upholds that a judge must disqualify or recuse themself under the following circumstances:

> "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding"

The exact language utilized above also applies to judges presiding in Indiana as laid out in the Indiana Code of Judicial Conduct, Rule 2.11 (a) (1).

The law clearly states that a judge should recuse themself from a case when they bear a "personal bias," but how would someone know to recuse themself if they remain unaware of the bias? Though the courts have long been assumed to be impartial arbiters of justice, they, too, are human and thus have biases—even if they don't acknowledge them. Scholars who dedicate themselves to understand why inequality is prevalent in various legal contexts have concluded implicit bias is a "lead contributing factor" (Hyman, 2014, p. 41). Implicit bias permeates the court system primarily in one of two ways. First, it can produce "incidental effects on the way people perceive, interact with, and understand others" (Hyman, 2014, p. 42). Second, implicit bias can manifest in "tangible forms of discrimination which can alter the course of decision-making" (Hyman, 2014, p. 42). When left unchecked, these biases can permeate every step of the judicial process.

From the very first meeting with their attorney, the client's "credibility, their jury appeal, and the viability of their legal claims" will presumably be met assessed with the counsel's implicit biases (Simmons, 2016, p. 36). While judges are responsible for deciding a case, an attorney clearly has a huge stake in their client's end result. In her article "Litigator's Beware: Implicit Bias," Sarah Q. Simmons, J.D., suggested that attorneys "question whether [their] assessment of clients" reflects the client's actual claims or the attorney's subconscious bias (2016, p. 36). For example, some assert that attorneys are less likely to encourage a father to seek full custody than they are a mother (Rosin, 2014).

Studies on how judges decide their cases revealed that they "rely extensively on intuition, more than deliberative judging" (Bennett, 2010, p. 157). This process of decision making lacks all of the safeguards against "underlying prejudice" provided by more deliberative methods (Hyman, 2014, p. 44). The decision-making employed by the justices studied mirrored trends of

how individuals in general make decisions. Based off of their initial perceptions, they utilized certain schemas to guide their decision (Hyman, 2014, p. 41). These schemas are "largely automatic," storing our implicit biases, stereotypes, and attitudes (Hyman, 2014, p. 41). Though schemas often serve individuals well by providing them relatively accurate perceptions in an efficient manner, the associations our brain has created do not always reflect the reality of a given situation (Hyman, 2014, p. 41).

A similar phenomenon was at hand in various cases explored in Part One. For example, in *In re Marriage of Tresnak*, the trial court judge assumed that the father would be best equipped to parent the sons because he would "be able to engage in various activities with the boys, such as athletic events, fishing, hunting, mechanical training and other activities that boys are interested in." 297 N.W.2d 109, 112 (Iowa 1980). However, there was no evidence presented by the father's council that would corroborate this claim, nor is there any evidence that engaging in such activities does a good parent make. In this case, the judge ruled based off of evident gender stereotypes which biased him.

With the creation of the Implicit Association Test (IAT), researchers have been able to more thoroughly test for implicit biases. These tests "measure individuals' reaction times to associations between various concepts (e.g., Black or White) and attributes (e.g., good or bad)" (Hyman, 2014, p. 41). Regarding gender, these tests have revealed that women are more often associated with home and men with career. These results could have implications for who judges intuitively consider to be a better parent. Indiana courts obviously incorporate biases, even if unintentionally, in their rulings. As established prior, gender/sex biases are some of the most primal and deeply embedded. Could these justices be placed at a higher incidence for bias than the average person?

Some studies on implicit bias focus on *priming*, the "incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context" (Bargh, Chen & Burrows, 1996, p. 230). A 2010 study conducted at Rutgers University examined the effect of priming gender roles on implicit biases. Their results indicated that those primed with "traditional gender roles showed increased automatic gender stereotypes relative to controls" (Rudman & Phelan, 2010, p. 192). Another study testing the effect of gender priming on women's success in math showed that women will perform as they are taught to believe they will. For example, women primed with the belief that women are bad at math categorically did much worse on the test provided than did women who were told that there are no disparities between men and women's math abilities (Steele & Ambady, 2006, p. 434).

It is both good and bad news that implicit biases are dynamic and malleable. Fortunately, the effect of a judge's implicit gender/sex biases can be mitigated through priming. Unfortunately, they can also be emphasized with priming. Indiana Code § 31-14-13-2 implies that the sex of the child is categorically significant to that child's experience post-divorce. Even though that implication is not grounded in empirical evidence, judges are likely to assume strict male/ female dichotomies exist and that they have substantial effects on the child's disposition and needs. By listing sex explicitly as a factor, Indiana Code implies that males and females are fundamentally different. These implication could prime judges to decide accordingly.

Part Three:

Proposing a Change

I. Overview of the Policy

As applied to family law, the Best Interest of the Child Doctrine guides judges in deciding child custody cases via a highly subjective, discretionary test which weighs all factors deemed relevant to the wellbeing of a given child. This now hegemonic standard was formulated as a gender-neutral reaction to its predecessor, The Tender Years' Doctrine. Predicated on the belief that mothers were inherently better caregivers than fathers, under the Tender Years Doctrine courts would commonly rule that a child should be placed in the custody of the mother—especially if the child was of "tender years", or less than four years old. Because this standard put undue burden on mothers and disadvantaged fathers, the Best Interest of the Child Standard (BICS) sought to provide a standard gender-neutral in nature, so that neither parent would be favored simply because of their sex/ gender.

The Uniform Marriage and Divorce Act (UMDA) of 1970 set the stage for a state-by-state nationwide acceptance of the BICS. Because family law falls within the discretion of state government rather than the federal government, each state was allowed to incorporate (or not incorporate) the standard in their own way. Indiana is one of 22 states to define the BICS statutorily in two parts—first, in more general terms with "overarching goals, purposes, and objectives" (Child Welfare Information gateway, 2016, p. 2) and, second, in specific statutory criteria. Indiana Code § 31-14-13-2 predominantly draws upon those factors laid out previously in the UMDA. Below is the statute which delineates some of those factors deemed "relevant" when determining what is best for a child (phrases in bold overlap with the UMDA):

(1) The age and sex of the child.
(2) The wishes of the child's parents.
(3) **The wishes of the child,** with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
(4) The interaction and interrelationship of the child with:
(A) the child's parents;

(B) the child's siblings; and
(C) any other person who may significantly affect the child's best interest.
(5) The child's adjustment to home, school, and community.
(6) The mental and physical health of all individuals involved.
(7) Evidence of a pattern of domestic or family violence by either parent.
(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

Subsection Seven (7) and Eight (8) were both added to the statute in the 90s (1996 and 1999 respectively), meaning that barring criterion one, all other factors outlined in the original statute were drawn directly from the factors posed in the UMDA. Criteria 2-6 constitute the entirety of the factors listed in the UMDA. Why was Indiana compelled to add IC § 31-14-13-2 (1)? Does empirical research on sex difference (or gender difference) merit this consideration?

II. Critique of Policy

Against the standard itself, many criticisms have been leveled. Assessed as too subjective and incommensurable, critics hold that it provides the judge an excess of personal discretion. When specifically assessing the merit of weighing a child's sex as a factor directly related to their best interests, further critiques surface. As the evidence posed on Part Two suggested, research has found that boys and girls are "basically the same" (Hyde, 2005, p. 586) despite the consensus among a majority of Americans that they are "basically different" (Parker et al., 2017). Studies have concluded that there are negligible differences between boys and girls themselves (Hyde, 2005; Costa Jr., et al., 2001; Else-Quest et al., 2006; Zell et al., 2015; Siegling et al., 2015; Maccoby, 1990), their needs, and, more specifically, their needs post-divorce (e.g., Sigal et al., 2011; Amato & Gilbreth, 1999; Amato & Keith, 1991; Amato, 2000; Bastaitis & Mortelmans, 2016; Kelly & Emery, 2003).

When the sex of the child is weighed, it is weighed in concert with that of the parent. *Re The Marriage of Tresnak*, 297 N.W.2d 109, 112 (Iowa 1980). Just as studies have found negligible differences between boys and girls, research (e.g., Biblarz & Stacey, 2010; Dufur et al., 2010; Crowl et al., 2007; Ryan et al., 2006) also indicates that neither parent provides better care due to their gender or sex. Finally, difference in the sex composition of parent-child dyads (i.e. mother- daughter, mother-son, father-daughter, father-son) has not proved substantive (Russel & Saebel, 1997, p. 139). By explicitly listing sex as a factor, Indiana Code implies that males and females are fundamentally different. This implication could "prime" (incidentally activate knowledge structures, such as traits or stereotypes) judges to decide according to their implicit biases related to gender/ sex.

Not only is the addition of sex as a consideration not empirically grounded, it also problematic in a legal sense. IC § 31-14-13-2 (1) likely provides Indiana judges a "backdoor" to the Tender Years Doctrine (Atkinson, 1983, p. 13), which is a standard proven not to be in the child's best interest. *Watts*, 350 N.Y.S.2d at 291. Considering the sex of the child contradicts the gender neutral intent of the standard facially and implicitly. By doing so, the judiciary fosters an environment prone to bias and subjectivity regardless of impartial intent.

The consideration of the sex of the child has been statutorily forbidden by several states (i.e. Arizona, Arkansas, California, Nebraska, Texas, Vermont) and ruled unconstitutional by others (e.g., Alabama, Iowa, New York). State courts have ruled that such considerations follow precedent laid in *Frontiero v. Richardson* (1973) and often violate their state's equal protection clauses. The state of Alabama even held that the consideration of sex violates the Equal Protection Clause found in the U.S. Constitution's Fourteenth Amendment *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31, (1994). Finally, the Indiana Court of Appeals has previously

held that the consideration of child's sex when determining child custody is "suspect" *Matter of Adoption of Thomas* 431 N.E.2d at 513.

III. Recommendations

By synthesizing empirical research on gender/sex differences with legal research on context surrounding the Best Interest of the Child Doctrine, this paper finds in favor of the ruling in *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 291 (N.Y. Fain. Ct. 1973), there is no "compelling state interest" for discriminating on the basis of sex in child custody cases. The gender/sex differences between males and females are not substantive enough to merit drawing such a distinction. Moreover, the research available indicates that such discrimination is presumably unconstitutional. As such, the Indiana General Assembly should not only eliminate § 31-14-13-2(1), they should also prohibit its consideration statutorily. Precedent for this legislative change can be found in the respective statutes of Arizona, Arkansas, California, Nebraska, Texas, Vermont.

Below is the recommended legislative modification for the Indiana General Assembly regarding IC § 31-14-13-2. Per the Indiana General Assembly's Printing Code, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

> Sec. 2. The court shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a presumption favoring either parent. **The Court shall not apply a preference for one parent over the other because of the sex of the child or the sex of a parent.** The court shall consider all relevant factors, including the following:

~~(1) The age and sex of the child.~~

~~(2)~~ **(1)** The wishes of the child's parents.

~~(3)~~ **(2)** The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.

~~(4)~~ **(3)** The interaction and interrelationship of the child with:

(A) the child's parents;

(B) the child's siblings; and

(C) any other person who may significantly affect the child's best interest.

~~(5)~~ **(4)** The child's adjustment to home, school, and community.

~~(6)~~ **(5)** The mental and physical health of all individuals involved.

~~(7)~~ **(6)** Evidence of a pattern of domestic or family violence by either parent.

~~(8)~~ **(7)** Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

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